

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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JAMES LINLOR :
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 Plaintiff :
 :
 versus : Civil Action Number
 :
 MICHAEL POLSON : 1:17-CV-13
 :
 Defendant. :
-----x

June 22, 2017

The above-entitled Motions Hearing was continued
before the Honorable James C. Cacheris, United States District
Judge.

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IT REPRESENTS TESTIMONY AND PROCEEDINGS OF
THE CASE AS RECORDED.

A P P E A R A N C E S

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P R O C E E D I N G S

THE DEPUTY CLERK: James Linlor v. Michael Polson.
Civil Case Number 1:17-CV-13.

THE COURT: I'll take Linlor versus Polson.

CAPTAIN LINLOR: Good morning, Your Honor. Captain
James Linlor, pro se plaintiff.

THE COURT: Good morning, sir.

MS. MURLEY: Good morning, Your Honor. Nicole
Murley, special assistant United States Attorney.

THE COURT: Good morning.

MR. BARGHAAN: And good morning, Your Honor.
Assistant United States --

THE COURT: Good morning, Mr. Barghaan. This comes
on the defendant's motion. You can have a seat, Captain.

MS. MURLEY: Good morning, Your Honor. I'm here on
behalf of the defendant, Michael Polson.

Your Honor, we've briefed the issues thoroughly in
our papers so I'll spare the Court with a lengthy recitation
of those arguments and just provide the Court a brief outline
of the arguments and make a few key points and then answer
some questions, if necessary.

THE COURT: I thought you were relying on the new
Ziglar case, which is, I think was issued last Monday.
Ziglar, Z-I-G-L-A-R v. *Abbasi*, A-B-B-A-S-I, which is 582 U.S.

1 Go ahead.

2 MS. MURLEY: Yes, Your Honor. We filed the
3 supplemental or Notice of supplemental authority.

4 And in that, *Bivens* does not imply a cause of action
5 in this context where the unique national security interest in
6 which plaintiff's *Bivens* claims arise. Which is detecting
7 potential threats to commercial aviation is a special factor
8 that counsels hesitation against extending *Bivens* in this
9 context.

10 And as Officer Polson argued in his briefs, for that
11 reason the Court should not extend *Bivens* in this context.

12 THE COURT: And the Supreme Court has said not to
13 extend *Bivens*.

14 MS. MURLEY: Correct. Outside the traditional law
15 enforcement function which is the core of the *Bivens* case.

16 THE COURT: What about the *Tobey* case from the
17 Fourth Circuit?

18 MS. MURLEY: Your Honor, as we noted in our briefs,
19 the *Tobey* case is different from this case because it
20 addressed qualified immunity but it did not reach whether or
21 not *Bivens* could extend in that context. And it did not
22 address whether or not there's special factors. And as the
23 Supreme Court instructs in *Abbasi* when you're in a context
24 outside of *Bivens*, the Court must address whether or not
25 special factors counsel hesitation. And in this case -- and

1 the Supreme Court says *Bivens* is rarely available outside the
2 limited context.

3 And *Abbasi* requires that in doing the special
4 factors analysis, it requires the Court to assess the impact
5 the damages would have on Government operations nationwide.

6 And specifically in this case, recognizing a
7 *Bivens* --

8 THE COURT: The plaintiff, the captain claims he was
9 assaulted when he was being -- before he can go through the
10 security line at the airport.

11 MS. MURLEY: In a -- the *Bivens* analysis is a
12 context specific analysis. It's the context in which the
13 allegations of unconstitutional conduct arise, not the
14 allegations of themselves that factor into the analysis of
15 whether or not *Bivens* should be extended. And in this case
16 recognizing a *Bivens* remedy against transportation security
17 officers could have a possible chilling effect on the TSO's
18 efforts to follow the standard operating procedures and
19 complete the necessary thorough pat down screenings with the
20 degree necessary to discover potential threats or prohibited
21 items.

22 And the -- *Abbasi* makes clear, you know the Court
23 should not and indeed cannot extend *Bivens* in this case where
24 there are special factors that counsel hesitation.

25 THE COURT: What about the Captain's ultimate

1 remedies if your position is correct?

2 MS. MURLEY: Well, the special factors analysis
3 would be dispositive in and of itself, but under *Wilkie*
4 there's two inquiries the Court can make in determining
5 whether or not to extend *Bivens*. And here we noted that, and
6 as plaintiff was aware, he could file an administrative FTCA
7 Claim in front of the agency. And indeed he did file the SF
8 95, but he --

9 THE COURT: Let me ask you this, isn't the exception
10 assault and battery under FTCA?

11 MS. MURLEY: No.

12 THE COURT: Okay.

13 MS. MURLEY: And he could raise that claim before
14 the agency and indeed he did, but he did not -- it was not
15 accepted because it was not signed properly. He used a
16 pseudonym. He could have also made a complaint.

17 THE COURT: You say he also could make a complaint?

18 MS. MURLEY: Yes, he could make a complaint to the
19 Transportation Security Administration.

20 THE COURT: Well, if they found it valid, they
21 wouldn't provide him with any damages, would they?

22 MS. MURLEY: The ultimate question for *Bivens*
23 alternative remedies is not whether damages is available, but
24 whether or not there is an alternative remedy available. The
25 ultimate question is not whether there's damages, it's whether

1 or not there's an alternative means for the plaintiff to raise
2 his claim. And in this case, there is, as we -- as we've set
3 forth in the briefs.

4 THE COURT: Very well.

5 MS. MURLEY: And even if the Court were to imply the
6 *Bivens* remedy in this case, for the alleged constitutional
7 violations, Officer Polson is entitled to qualified immunity.
8 Just as an initial matter, plaintiff concedes in his
9 opposition that the security screening process is a
10 constitutionally permissible warrantless administrative search
11 under the Fourth Amendment. And plaintiff failed to state a
12 plausible claim for relief under the Fourth. He fails to
13 plead sufficient facts establishing that security screening
14 executed by Officer Polson was an unreasonable administrative
15 search. And as set forth in detail in our briefs, the Court
16 should consider the video, which was incorporated by reference
17 in plaintiff's complaint. Plaintiff repeatedly refers to the
18 video. Indeed, incorporates in the headings of his complaint,
19 plaintiff indicates that he is incorporating that video.

20 It's integral to his complaint and it does not
21 support his allegations that Officer Polson intentionally
22 struck him. After reviewing the video, there cannot be any
23 dispute what the video depicts.

24 THE COURT: I don't think I can consider the video
25 in this motion to dismiss. But, go ahead. It may be

1 something for summary judgment if we reach that. Okay, go
2 ahead.

3 MS. MURLEY: Even if the Court were to not consider
4 the video, plaintiff still fails to plausibly plead claims for
5 -- a claim under the Fourth Amendment. Once you weigh through
6 all the conclusory allegations in his complaint, what we're
7 left with is his claim is that Officer Polson intentionally
8 struck him in the groin. This is not on its face equal
9 unreasonable force under the Fourth Amendment.

10 Indeed, *Iqbal* is instructive here. *Iqbal* tells us
11 that even when a complaint contains factual allegations that
12 are consistent with illegal conduct, the complaint cannot
13 survive a motion to dismiss when the allegations are more
14 likely explained by a legal conduct.

15 And in this case the TSA pat down procedures that
16 are at issue in this case require a transportation security
17 officer to place his hands on either side of the person being
18 screened and slide up until resistance is met.

19 THE COURT: Well, apparently he did the right leg
20 first and then the left leg and that's where the problem is.

21 MS. MURLEY: Correct. The right leg there was no
22 issue and the left leg slides up and was met with resistance.

23 And *Iqbal* implores the Court to draw on its judicial
24 experience and common sense when it's considering whether the
25 factual allegations that are pled are consistent with the

1 legal conduct or whether they're better explained by lawful
2 conduct such as the TSO carrying out his lawful duties during
3 a security screening pat down. And the nature of the pat down
4 is, you know, bodily conduct -- contact.

5 And even if this Court were to conclude that Officer
6 Polson utilized unreasonable force and thus somehow violated
7 plaintiff's Fourth Amendment rights, Officer Polson would
8 still be entitled to qualified immunity. There's no law at
9 the time establishing a specific degree of permissible
10 intrusiveness of a security screening pat down by a
11 transportation security officer.

12 As I've previously discussed, Officer Polson's job
13 duties and obligations as a TSO requires him to ensure that
14 the screening of all passengers and property are done before
15 the person is allowed to proceed on an aircraft. And if
16 there's any doubt, case law tells us that Polson's conduct
17 falls within the gray area and covers bad guesses in gray
18 areas. Officer Polson's decision to conduct the pat-down
19 screening was objectively reasonable and transgressed no
20 bright lines. And for all of those reasons, the Court should
21 dismiss plaintiff's amended complaint.

22 THE COURT: Very well. Captain.

23 CAPTAIN LINLOR: Thank you, Your Honor.

24 Well, where to begin and I will try to keep this
25 brief. The issue that defense counsel and defendant refer to

1 they throw all kinds of things against the wall and seeing
2 what might stick. The issue is not against the standard
3 pat-down screening. As the Court might imagine, I'm much in
4 favor of proper security procedures on my aircraft and for my
5 crews' safety. I go through many screenings every year. Most
6 of them through crew entrances, but sometimes I'm required to
7 have pat downs. Never had a problem before.

8 The problem is one of and I -- it's documented in my
9 complaint, which of course as this being a 12(b)(6) hearing,
10 is saying have I stated facts for which a remedy is available.
11 If the fact that and shown on the video that I did reference
12 I'm -- I just don't know what video the defendant is talking
13 about. I have not --

14 THE COURT: I haven't seen it. I'm not going to
15 look at it to decide this issue. And if there's -- depending
16 where we're here if it's a summary judgment later on, I will
17 view it.

18 CAPTAIN LINLOR: I understand. But the issue
19 becomes during a pat-down screening, there is no TSA standard
20 operating procedure that authorizes a screener to forcefully
21 strike passengers in the groin. Which, under Virginia code is
22 felony sexual battery. And that's referenced in my pleading.
23 Those are the specific definitions referenced there. It's
24 also for this case against the Fourth Amendment to reasonable
25 searches. And that's the bright line that we're talking

1 about.

2 THE COURT: Have you read the *Ziglar v. Abbasi* case?

3 CAPTAIN LINLOR: I don't know that. I do know the
4 *Tobey* case. I was going to refer to that next. The *Ziglar*
5 I'm not familiar with.

6 THE COURT: *Tobey* was 2014, of course, *Abbasi* is
7 2017.

8 CAPTAIN LINLOR: The case -- that was the one that I
9 just got here?

10 THE COURT: Just the Supreme Court.

11 CAPTAIN LINLOR: The Supreme Court. I received that
12 literally five minutes before Your Honor entered the courtroom
13 from counsel.

14 THE COURT: All right, sir.

15 CAPTAIN LINLOR: From defense counsel. On first
16 glance -- and I'll be happy to file a response to it after a
17 little bit more decided [sic] reading. But at first glance,
18 if like most other things that defendant is referencing, it's
19 not applicable. It's talking about if someone should be
20 arrested or threats to commercial aviation. And we're talking
21 about a screener hitting a passenger in the groin as part --
22 where the passenger is totally cooperative -- for no cause
23 whatsoever. The defendant is trying to say that's a part of
24 standard procedure. That the screeners get to go hit every
25 passenger in the groin because that's their standard

1 procedure. I disagree.

2 This case -- this latest one here *Ziglar* is what
3 you're saying, if I'm pronouncing it right. Yeah, *Ziglar*, I'm
4 sorry. Again, not applicable. Defendant is just throwing
5 stuff against the wall.

6 Let me refer to the case that the Court happened to
7 mention before, *Tobey v. Jones*. And talking about the *Bivens*
8 remedy. In that case both First Amendment and Fourth
9 Amendment contentions in there, the passenger was not being
10 cooperative and so that was the issue with the Fourth
11 Amendment. But in *Tobey v. Jones*, the Court held, the Fourth
12 Circuit held that *Bivens* is applicable for in this case --
13 that case a First Amendment violation. But, this case is a
14 lot closer to the original *Bivens* situation for a search is a
15 Fourth Amendment not a First Amendment issue. So there is no
16 expansion. There is no other remedy available. And I'll get
17 to qualified immunity in just one minute.

18 I'm glad the Court was aware that Federal Tort
19 Claims Act 2680(h) precludes the use of the Federal Tort
20 Claims Act for a remedy. There is no other remedy available
21 to me. I tried --

22 THE COURT: Well, they say you can call and make a
23 complaint.

24 CAPTAIN LINLOR: I called, I faxed, I tried
25 everything. In fact, you know what's really ironic, I tried

1 to give a benefit of a doubt. I work with a lot of folks in
2 aviation as you might imagine. I tried to give the benefit of
3 the doubt to Michael Polson. I asked him three times,
4 including in front of witnesses, and I called the witnesses, I
5 called the airport police for witnesses. And I asked Mr.
6 Polson, I said, "Look, if this is actually a mistake, I want
7 you to apologize." I asked him three times to apologize. He
8 and a supervisor, as I state in the complaint, both said,
9 "That wasn't an accident. That was intentional." And they
10 laughed. And they challenged me to prosecute them.

11 So they're trying to go -- the guy has anger and
12 arrogance issues which is part of the problem here.

13 Now I also want to point out for the Court that
14 there was a -- that Michael Polson was arrested by me on a
15 valid citizens arrest, that again TSA, local police, and all
16 of us are aware of, local prosecutors have confirmed with a
17 valid citizens arrest for felony sexual battery.

18 So I have tried other methods also, both criminal as
19 well as civil for resolution of this. It's not a question of
20 whether there is adjudication. I have documented in the
21 complaint where all the other avenues have been closed to me
22 where there wasn't adjudication. I'm not whining about saying
23 "Oh, I didn't get my way." There was no adjudication. That's
24 the problem. This -- this is the only method and that's why
25 *Bivens* applies.

1 Your Honor looks like you're about to ask me a
2 question.

3 THE COURT: Very well.

4 CAPTAIN LINLOR: I have one more point to make, if I
5 may. But let me, please. Should I continue or stop?

6 THE COURT: Go ahead.

7 CAPTAIN LINLOR: Okay. Last point about qualified
8 immunity. And it's important because qualified immunity,
9 certainly to Harlow Standard of reasonableness and all of
10 that, but there's also cases that show *Beers-Capital v.*
11 *Whetzel*. And I did plead deliberate indifference and
12 recklessness. And in that case, which is from the Third
13 Circuit, 2001, "When there is deliberate indifference --"
14 under *Farmer*. And this is a quote from the case. Deliberate
15 indifference under *Farmer*, "a defendant cannot have qualified
16 immunity if he or she in this case was deliberately
17 indifferent." So that makes a huge item there.

18 Also it gets into the -- if the -- that from
19 *Anderson v. Creighton*, Supreme Court, 1987, that -- that there
20 was -- that the defendant would lose that defendant's immunity
21 if a lawfulness of the conduct was apparent. And defendants
22 have not -- defendant has not provided any type of evidence,
23 and I would challenge them to do so, that lawful -- the
24 lawfulness of forcefully striking a passenger in the groin is
25 somehow not self evidently not necessary and unlawful.

1 THE COURT: Very well. I understand your argument.

2 CAPTAIN LINLOR: May I sit down?

3 THE COURT: Yes, sir. Government gets a rebuttal.

4 Ms. Murley, is there -- the Captain argues there's no
5 procedures at TSA screening of passengers. Is that correct?

6 MS. MURLEY: No, Your Honor, that's not correct.

7 The transportation security officers operate under
8 standard operating procedures. Now the contents of those
9 procedures, the majority of which are classified as sensitive
10 security information so they're not public, but there are --
11 the operating procedures dictate parameters in how a
12 transportation security officer conducts a pat-down screening.
13 The portion of the procedures that's relevant to this case,
14 where you must slide your hand up until you meet resistance,
15 has actually been made public. And there's some case law
16 cited in defendant's brief that discusses that specific
17 requirement.

18 Just to clarify a few points. The *Tobey* case never
19 addressed the *Bivens* special factors argument. That wasn't
20 raised in that case. So that case does not address that.

21 And then with regard to *Abbasi*, now the Supreme
22 Court essentially limited *Bivens* to its particular facts.
23 Where a law enforcement is conducting a search -- law
24 enforcement officer is conducting a search without a warrant.
25 That is a different context in this case. And the Court held

1 that any extension, however small, is indeed an extension.

2 And to further that point, *Abbasi* concerned the
3 Eighth Amendment condition of confinement claims that we see a
4 lot of the times. And the Supreme Court held that because it
5 was in a national security context and the detentions were
6 different, that that was significant to justify that it was in
7 a different context.

8 THE COURT: Thank you. Okay. I'll take it under
9 advisement and let you all know, okay, in the next 10 days.
10 Thank you very much.

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12 **(Proceedings adjourned at 10:24 a.m.)**
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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motions Hearing in the case of the **JAMES LINLOR versus MICHAEL POLSON**, Civil Action Number 1:17-CV-13 in said court on the 22nd day of June, 2017.

I further certify that the foregoing 17 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the 25th day of July, 2017.



Tonia M. Harris, RPR
Official Court Reporter